No. 87-1481

In The

Supreme Court of the United States

October Term, 1987

REECE MORREL,
DONALD HERROLD,

and

J. CHARLES SHELTON,

Petitioners,

vs.

TRINITY BROADCASTING CORP.,
a Michigan corporation,

Respondent.

On Petition for a Writ of Pre-Judgment Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the instant Petition for *Pre-Judgment* Writ of Certiorari involve or present any question or issue "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement by this Court," as required by Supreme Court Rule 18?

2. Is it in the interests of the orderly administration of justice, or of judicial economy, for the Petitioner to seek interlocutory review in the Supreme Court *after* allowing the substantive merits of the appeal below to be fully briefed in the Tenth Circuit?

3. Do the interlocutory decisions herein by the U.S. Court of Appeals for the Tenth Circuit merit the Supreme Court's attention at this juncture?

In the event that this Petition is granted, Respondent would urge that the scope of the "Questions Presented" be broadened to include at least the following:

4. When does an otherwise final decision in a case which has been consolidated with other cases become "final" for appeal purposes?

5. In a case certified by a District Court for an immediate or interlocutory appeal, is it fatal to the appeal that the certification may have been entered after the docketing of the appeal, or may such certification be taken as *nunc pro tunc?*

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COMES NOW Respondent, TRINITY BROADCASTING CORP., a Michigan corporation,[2] and respectfully

[1] This caption lists all Parties to this Certiorari action in the Supreme Court.

[2] Trinity Broadcasting Corp. has no corporate parents, affiliates or subsidiaries.

urge that the Supreme Court deny a Writ of Certiorari herein, for the reasons which follow.

—o—

RESTATEMENT OF THE CASE

The "Statement of the Case" in the Petition for Certiorari herein totally glosses over the central fact that the Petitioners seek *pre-judgment review* of the interlocutory decision(s) by the U.S. Court of Appeals for the Tenth Circuit, where the substantive merits of the Appeal now pending therein have been fully briefed and are awaiting oral argument and decision. That is, the two decisions by the Tenth Circuit assailed herein were *not* on the actual merits of that Appeal (10th Cir., No. 86-2118), but rather, were only on certain details of appellate practice, and in more particular, on the minutiae of the required docketing sequence in a consolidated case certified by the District Court for an immediate appeal [see Federal Rule 54(b) and 28 U.S.C. 1292(b)].

In truth, there does appear to be some disagreement between the Circuits on one of the narrow questions impliedly presented in the instant Petition—and it was undoubtedly for that conflict that the Tenth Circuit, while agreeing in the abstract with the Petitioners (Appellees below), nevertheless decided not to penalize the Respondent (Appellant below) with a *retroactive* application of the Ninth Circuit's view of the matter, which the Tenth Circuit did adopt herein and will apply to all such future cases.

The underlying substantive merits of this lawsuit are as follows: The Respondent, Trinity Broadcasting Corp., Plaintiff in the U.S. District Court for the Northern District of Oklahoma, first sued (in Case No. 82-C-1188-C, filed on December 12, 1982) one Leeco Oil Company, Inc., and its principal, a Mr. Lee Eller, for certain violations of the Oklahoma "Blue Sky" [Securities] Act, 71 Okla. Stat. 101 et seq, to recover the purchase money (One Million Dollars) paid by Trinity for Trinity's acquisition of an unregistered security, to wit: shares in an oil and gas limited partnership sold by Leeco and Mr. Eller. Later, Trinity also sued (in Northern District of Oklahoma Case No. 83-C-642-C, filed on July 25, 1983), the instant Petitioners, Messrs. Reece Morrel, Donald Herrold and J. Charles Shelton, who happen to be attorneys practicing law in Tulsa, Oklahoma, for essentially the same relief, based on their double involvement in that securities violation: first, as the attorneys who drew up the papers creating the unregistered limited partnership (a "security" required to be registered under Oklahoma law, 71 Okla. Stat., Secs. 2(20)(R), 2(20)(K), and 2(20)(P)), and second, as indirect vendors (through Leeco and Mr. Eller) of *their own* "oil patch" properties to Trinity. These two cases were consolidated by the District Court on December 5, 1983.

The real question, then, is whether, under 71 Okla. Stat. 408(b) [reproduced at Appendix A hereto], Messrs. Morrel, Herrold and Shelton fall within the terms "Every person who materially participates or aids in a sale or purchase [of an unregistered security] . . . or who directly or indirectly controls any person [who sells an unregistered security] . . ." If Messrs. Morrell, Herrold and Shelton

do come within the foregoing definition, then Trinity can recover the One Million Dollars that it paid for the essentially worthless oil properties which it acquired from the Petitioners. If the Petitioners do not come within the foregoing definitions, then they are "home free."

The foregoing 71 Okla.Stat. 408(b) has never been construed by the Oklahoma Supreme Court.[3] There is some Federal authority to the effect that a lawyer who is only involved in the sale of unregistered securities to the extent of merely preparing the documents involved is not liable as a "seller" under Section 771 of the [Federal] Securities Act of 1933 (15 U.S.C. 771). However, there is also authority, from other States, construing "Blue Sky" statutes very similar to Oklahoma's, to the effect that attorneys who go beyond the mere scrivening of legal documents can indeed be held liable as "materially participating and aiding" in such sales, or "directly or indirectly controlling" the sellers. See *Adams v. American Western Securities, Inc.* (Ore., 1973) 510 P.2d 838, 841; *Black & Co. v. Nova Tech, Inc.* (D.Ore., 1971) 333 F.Supp. 468, 472 (construing Oregon law); see also *Cola v. Terzano* (1984) 129 N.J.Super. 47, 322 A.2d 195, 199.

As it turned out, the District Court entered summary judgment in favor of Messrs. Morrel, Herrold and Shelton. Therefore, Trinity appealed to the Tenth Circuit, and the District Court certified its decision for immediate appeal. In the Court of Appeals, Trinity is naturally urging first, that the District Court overlooked the Petitioners'

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[3] A motion to certify the interpretation of the never-construed 71 Okla.Stat. 408(b) to the Oklahoma Supreme Court, under the Oklahoma Certification of Questions of Law Act, 20 Okla.Stat. 1601 et seq., is pending in the Tenth Circuit.

involvement in the transactions at bar above and beyond that as mere legal scriveners (i.e., they succeeded in unloading their own worthless oil properties on Trinity through the very limited partnership that they had drawn up!); second, that the District Court erroneously followed the Federal decisions construing "sellers" rather than State decisions construing "material participators and aiders" and the like; and third, that these issues should be resolved by full trial on the merits, rather than by summary judgment.

However, there is some authority to the effect that Trinity's previous attorneys got their docketing sequence for appeal somewhat out of order, to the effect that the District Court should have certified the appeal first, and then Trinity should have appealed. Hence, the Court of Appeals' inquiry re the docketing herein, which inquiry has led to the Tenth Circuit's decision(s) assailed herein, entertaining Trinity's appeal in *this* instance, but with an opposite rule to apply in future appeals.

With this extremely narrow scope of the interlocutory decision(s) herein in focus, let us now turn to the immediate question of whether the Supreme Court should or should not assume yet further interlocutory appellate jurisdiction herein.

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REASONS FOR NOT GRANTING THE WRIT

I. Supreme Court Rule 18

Supreme Court Rule 18 says that pre-judgment certiorari to a United States Court of Appeals "will be

granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." The cases cited by the Supreme Court itself as illustrative of the Rule 18 standard overwhelmingly demonstrate that *this case* falls *toto caelo* short of that extreme standard. This is especially so as this case involves neither Constitutional issues, separation-of-power issues, nor life-and-death issues or the like. In fact, given the Tenth Circuit's cautionary pronouncement that the result of its interlocutory decision(s) will apply *in this case only* (i.e., the *legal* decision will be applied prospectively only, to future cases), it is difficult to perceive any *public* importance or even interest in the interlocutory decision(s) assailed herein, beyond, of course, that of these particular litigants themselves.

Therefore, Certiorari should be denied.

II. Delay in Petitioning

Further underscoring the underwhelming importance of this case, or of any "emergency" need for immediate review by the Supreme Court, is the fact that the Petitioners themselves delayed filing their instant Petition until *after* the principal briefs on the substantive merits had already been filed in the Court of Appeals.[4] In fact, the Petitioners did not even *ask* the Tenth Circuit to allow the Parties to defer submitting their substantive briefs pend-

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[4] Trinity's Brief-in-Chief on the merits was filed in the Tenth Circuit on February 10, 1988; the Answer Brief was filed on March 6, 1988; and the Reply Brief was filed on April 8, 1988. This instant Petition for Certiorari was not docketed in the Supreme Court until March 7, 1988.

ing the filing and disposition of this Petition. Thus, the Petitioners sat back and allowed the Respondent (Appellant below) to go to the considerable expense and effort of preparing its principal brief before the Petitioners even indicated that they were contemplating an "end run" to the Supreme Court.

Therefore, Certiorari should be denied for the Petitioners' own conspicuous lack of diligence in filing their instant Petition.

III. Availability of Later Review

The Petitioners cite absolutely no reason whatsoever why the alleged jurisdictional issues urged herein cannot simply be preserved for later presentation to the Supreme Court after the Tenth Circiut's decision on the merits—which have been fully briefed. Indeed, if the Petitioners should win on those merits before the Court of Appeals, that might very well moot or otherwise obviate *any* need for review by the Supreme Court. And this is especially so since, as noted above, the Petitioners deferred filing their instant Petition until *after* the principal briefs on the merits had already been filed before the Circuit.

No interim or permanent injunctive relief is involved in this case, and if the Tenth Circuit should reverse the District Court's grant of summary judgment for the Petitioners (Appellees and Defendants below), the impact of that decision would be not to subject the Petitioners to any immediate or crushing monetary judgment, but rather, merely to direct the District Court to hold a trial—which the Petitioners (Defendants) might ultimately win—or which, if they should lose, they could then appeal from, and perhaps prevail on in the Court of Appeals without ever hav-

ing to petition the Supreme Court for relief. Even if, after all this, the Petitioner should yet lose, the Petitioners would still be at liberty *then* to seek review by the Supreme Court, in the context of a fully-litigated and *final* judgment.

IV. The Issues Assertedly Involved are not Clearly Presented

The Petitioners make much of a minor conflict as to when certain judgments, in consolidated cases, become "final" for purposes of conventional, direct appeals. However, in this case, the District Judge certified his summary judgment decision for immediate review. Federal Rule 54(b); cf. 28 U.S.C. 1292(b).

The immediate and interlocutory nature of the decision(s) herein aside, a Supreme Court affirmance of the Ninth Circuit approach adopted prospectively by the Tenth Circuit (see 827 F.2d at 675) herein—that a decision in one consolidated case is not "final" for appeal purposes until *all* the consolidated cases are disposed of—would only result in a ruling that normally such an appeal as the one below may be dismissed for prematurity, and without prejudice to refiling when *all* the consolidated cases are decided. [However, since the Tenth Circuit had never so held, and since Trinity might not have been able to accomplish a refiled appeal in this case in the face of a retroactive application of the Tenth Circuit's adoption of the Ninth Circuit's ruling herein,[5] the Court of Appeals

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[5] Proceedings in the other consolidated District Court case herein, against Leeco and Eller, were stayed on July 2, 1986, because of those defendants' bankruptcy. Once that consolidated

(Continued on following page)

very properly made its decision(s) herein prospective only.]

Or, if the Supreme Court should opt for the First and Sixth Circuit approach (also outlined in the first decision below (827 F.2d at 675)—which approach was rejected by the Tenth Circuit herein—then such a Supreme Court ruling would mean that the District Court's summary judgment herein *was* indeed final for appeal purposes, and there was no need for the District Court to have certified an immediate or interlocutory appeal herein.

Of if the Supreme Court should adopt the position of the Third, Fifth, and Seventh Circuits (again see 827 F.2d at 675), that finality depends on the circumstances, then such a Supreme Court ruling would only result in a remand to the Tenth Circuit for further proceedings.

Or, finally, if the Supreme Court should conclude that a District Court's certification of an order for immediate or interlocutory appeal can operate *nunc pro tunc*, then

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case (N.D.Okla., No. 82-C-1188-C) should ever be finally decided, then, perhaps, Trinity could refile its appeal herein as a consolidated appeal from *both* District Court cases. Thus, it may not be strictly true, as the Tenth Circuit feared, that a retroactive application of the Ninth Circuit rule herein would have left Trinity with *no* appellate remedy against Messrs. Morrel, Herrold and Shelton—but such a retroactivity would certainly delay immensely a refiled appeal, as the consolidated case against Leeco and Eller is *still* stayed.

Under this analysis, then, a Supreme Court reversal would in effect delay, but not deny, Trinity's appeal against the instant Petitioners (Morrel, Herrold and Shelton)—an eventuality which could render a Supreme Court intervention herein ultimately nugatory except as to the dilatory abstraction presented.

such a Supreme Court ruling would mean that Trinity's appeal was properly docketed irrespective of the foregoing disagreement between the Circuits.

All this, coupled with the prospective nature of the Tenth Circuit's precise ruling herein, militates to deprive any Supreme Court decision which might be rendered herein of having much, perhaps any, precedential effect or value. That is always a prime basis for denying Certiorari.

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CONCLUSION

The substantive issue before the District Court is, simply, whether the involvement of Messrs. Morrel, Herrold and Shelton in unloading their worthless oil properties on Trinity through the mechanism of an unregistered limited partnership is excused, under 71 Okla.Stat. 408(b), by the mere fact that, as attorneys, they possessed the skill to draft, and did draft, the very papers creating that limited partnership.

In the Court of Appeals, the issue is whether the District Court properly disposed of this matter by summary judgment, or whether the case ought to be resolved at a regular trial. Implicit in that question is the degree of involvement by Messrs. Morrel, Herrold and Shelton in the sale of the limited partnership which they drew up to unload their oil properties with: were they mere scriveners, or did their involvement go deeper? Also implicit in that substantive question before the Tenth Circuit is the proper interpretation of the never-construed 71 Okla.Stat. 408(b).

But in the Supreme Court, the issue appears to be the fine points of finality of consolidated orders, the docketing of appeals therefrom, the *nunc pro tunc* effectiveness of orders certifying decisions for immediate or interlocutory appeals, and the propriety, based on some conflict between the Circuits, of the Tenth Circuit's making its decision in this case prospective only.

Therefore, the instant Petition for Certiorari, which has nothing to do with the merits of this controversy, seeks Supreme Court review which irrespective of how decided offers to provide little to Bench or Bar in the way of precedential guidance. This instant Petition, therefore, evokes the memory of Roscoe Pound's immortal address, delivered early in this Century, on "The Causes of Popular Dissatisfaction with the Administration of Justice":

> . . . I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.
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> One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, *our American reports bristle with fine points of appellate procedure.* More than four per cent of the digest paragraphs of

> the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely, volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty per cent involve points of appellate procedure. In volume 87, of 53 decisions of the Supreme Court and 97 of the Courts of Appeals, 28 are taken up in whole or in part with the mere technics of obtaining a review. *All of this is sheer waste* which a modern judicial organization would obviate.

Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," delivered to the American Bar Association on August 29, 1906, reprinted in 8 Baylor Law Review 1, at 17-18, 19-20 (emphasis added). [Originally published in "Report of the 29th Annual Meeting of the American Bar Association, Part I," p. 395 (1906). The Baylor reprint (1956) was prefaced with some "golden anniversary" comments by Dean Pound himself.]

WHEREFORE, premises considered, Respondent prays that the Supreme Court deny a Writ of Certiorari in this matter.

Respectfully submitted,

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APPENDIX A

Section 408(b) of the Oklahoma Securities Act provides as follows:

> Every person who *materially participates or aids* in a sale or purchase made by any person liable under subsection (a), or who *directly or indirectly controls* any person so liable, shall also be liable jointly and severally with and to the same extent as the person so liable, unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and could not have known, of the existence of the facts by reason of which liability is alleged to exist. There shall be contribution as in cases of contract among the several persons so liable.

71 Okla.Stat. 408(b) (emphasis added).